

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.100 OF 2003

Bhojraj alias Kamal Thapa
Convict No.1848,
Kolhapur Central Prison
Kalamba, Dist.: Kolhapur ... Appellant

V/s.

The State of Maharashtra ... Respondent

None for Appellant
Mrs.V.R. Bhosale, APP, for Respondent

CORAM: V.G. PALSHIKAR &
SMT.NISHITA MHATRE, JJ.

DATED: NOVEMBER 6, 2006

ORAL JUDGMENT (PER PALSHIKAR, J.):

. This is an appeal by the accused who stands convicted under section 302 of the Indian Penal Code for causing homicidal death of one Manbahadur Singh Thapa. The accused was not represented by any advocate, therefore, Shri Motriya, Advocate was appointed to defend the accused. However, inspite of the matter being listed on the weekly board, none appears for the accused. Taking into consideration the fact that the appeals from jail are pending for last seven years, it should be causing unnecessary delay and injustice to those who are languishing in jail for all these years. We, therefore, deem it just and proper to decide the matter on merits on reappreciation of the evidence and the entire record before us. The learned Additional Public Prosecutor appearing on behalf of the State has

taken us through the entire evidence and our reappreciation of evidence stated briefly discloses the prosecution case as under:

The complainant Rambahadur Thapa was working as a watchman in Sai Shiv Palace, Ulhasnagar. His cousin Manbahadur Thapa was working as a watchman in Hanuman building in Shanti Nagar locality of Ulhasnagar town. Since they were related, they used to visit each other. On 20.5.2001, at around 10.15 in the night, the complainant was sitting in the compound of the building of which he was the watchman, playing with his son when he saw the victim being dragged by accused No.1 and accused No.2 was accompanying them. The complainant therefore, asked accused No.1 as to why the victim was so dragged. But the accused No.1 Raju did not reply at all. According to the complainant, who claims to be an eye witness, accused No.2 inflicted knife blows on the neck of Manbahadur Thapa as a result of which he collapsed and later on died. The complaint Exhibit 12 was lodged before the police by PW2, Rambahadur Thapa. He has proved it. This witness is therefore, the complainant. On the basis of this complaint, investigation was conducted. The accused persons were arrested and in due course were tried. During the trial, the prosecution examined 7 witnesses to prove its case and the learned trial Judge on appreciation of this evidence, convicted the accused by his order dated

1.11.2002 under section 302 of the Indian Penal Code to suffer imprisonment for life. It is this order which is impugned in this appeal on behalf of the accused.

2. In this case, there is only one eye witness, PW2, Rambahadur. The fact that the death of the Manbahadur was homicidal in nature is proved by PW1, Dr.Kundi, who conducted the postmortem on the dead body of Manbahadur. He has deposed that the death was caused due to stab injuries on the neck of the victim. PW3, Ravindrasingh, is the panch who has proved recovery of the knife at the instance of accused No.2, the present appellant. He has proved the recovery panchanama at Exhibit 22. Except this recovery, there is nothing on record to connect the accused No.2 to the crime. We will analyse the evidence of PW2 little later after taking note of the other evidence on record.

3. PW4 Miharaj is the panch who proved the recovery of clothes at the instance of Accused No.1. In view of the acquittal of Accused No.1, his evidence is inconsequential. PW5 is the Secretary of the Society where the deceased Manbahadur was working and that is proved by this witness that Manbahadur was working as a watchman in their society. PW6 has turned hostile and has not deposed to anything which in any way can support the case of the prosecution. The Investigating Officer has been examined as PW7. He has proved the documents

executed by him or executed in his presence.

4. This is the sum total of the evidence on the basis of which the learned trial Judge convicted the accused. The conviction obviously is based on the deposition of PW2 Rambahadur who claims to be an eye witness. This witness in his examination in chief has positively stated that he saw accused No.2 assaulting the victim, Manbahadur. He has not attributed any role to accused No.1. In the cross-examination, he submits that he had disclosed before the police while exhibit 12 was being recorded that the assault was caused by accused No.2. This does not find mention in Exhibit 12 at all. There is no mention of accused No.2 in the First Information Report. PW7, the Investigating Officer has stated before the Court that he has dutifully recorded the statements of all the witnesses. In view of this statement that he has recorded what was said before him the omission to mention any act on the part of accused No.2 by the eye witness PW2 becomes a serious omission. It is highly unlikely that a person witnessing the assault on his cousin will not even mention the name of the assailant in the complaint to the police. It appears that all that he stated before the police in Exhibit 12 was what exactly he saw happening namely he saw Manbahadur collapsing in front of the stores and he went there. It is pertinent to note that there is no appeal against the acquittal by the

State in relation to accused No.1. The conviction of accused No.2 therefore rests only on two circumstances. First is the eye witness account of Rambahadur PW2 and Second is the recovery of the knife, proved by PW3. Though the knife is recovered by the police, nothing is brought on record to show that the knife was handled by accused No.2 by proving the finger prints that may be available on the weapon. This in our opinion, is a lacuna which requires serious consideration as the accused stands convicted only on the circumstance of recovery of knife at his instance. It is legally not permissible to accept the contradictory statements of Rambahadur who claims to be an eye witness. Had he factually been an eye witness he would not have failed to name accused No.2 in the complaint. In the complaint, he names accused No.1 as the person who according to him caused the injury to the victim. The omission of not mentioning anything regarding accused No.2 is therefore, a serious omission which will have to be taken note of in view of the fact that the investigating officer has stated that he faithfully recorded the statements made by PW2 before the police which has been proved as Exhibit 12. In such circumstances, there is no evidence on record connecting the accused with the assault and homicidal death of Manbahadur. In our opinion, the learned Judge erred in convicting the accused on such a flimsy evidence. He should have seen that it was the duty of the prosecution

to prove the guilt of the accused beyond reasonable doubt. The omission of not mentioning anything about accused No.2 in the FIR, failure to prove any connection between the accused, the weapon and the victim by finger print expert, obviously establish that the prosecution has completely failed to prove beyond reasonable doubt the involvement of accused No.2. In our opinion, there is no reason whatever to sustain the order impugned in this appeal.

5. In the result, the appeal succeeds and is allowed. The accused is in jail for all these years. He be set at liberty forthwith, if not otherwise required in law.